14-613

No. 14-___

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

PATRICK R. DONAHOE, Postmaster General,
United States Postal Service,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Green respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a) is unpublished but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. Pet. App. 1a. On October 6, 2014, Justice Sotomayor extended the time to file this petition for a writ of certiorari to and including November 26, 2014. *See* No. 14A368. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 2000e-3(a) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

29 C.F.R. § 1614.105(a)(1) provides that "[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter

alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."

INTRODUCTION

Every year, thousands of employees bring constructive discharge claims under Title VII of the Civil Rights Act of 1964 and related statutes prohibiting workplace discrimination. Under constructive discharge doctrine, if those employees "resign because of unendurable working conditions," they are entitled to the same remedies available to employees who have been formally discharged in violation of those anti-discrimination statutes. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). To bring such claims to court, employees must first seek redress in mandatory administrative proceedings.

Yet the federal courts of appeals are intractably divided over *when* employees must initiate those proceedings. Five courts of appeals have held that the filing period for a constructive discharge claim begins when the employee resigns, defined as the date when he gives "definite notice" of his decision to leave. *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000). This is the earliest date that the claim is complete and actionable. By contrast, three other courts of appeals, including the Tenth Circuit below, start the filing period with the employer's last discriminatory act allegedly giving rise to the resignation – before the constructive discharge claim exists.

The federal government itself has provided conflicting answers to the question presented. The Equal Employment Opportunity Commission (EEOC)

has taken a position consistent with the majority rule, but in the proceedings below the United States Postal Service, represented by the Department of Justice, argued for the minority's last-act rule.

This case – in which the choice between these two timeliness rules is outcome-determinative – provides the Court with an ideal vehicle to restore uniformity to the legal landscape, ensuring that constructive discharge claims will no longer turn on geographical happenstance.

STATEMENT OF THE CASE

A. Legal Background

1. Constructive discharge doctrine treats "an employee's reasonable decision to resign because of unendurable working conditions" as a termination by the employer. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984). The doctrine emerged in the 1930s, when it proved necessary to resolve labor disputes "in which employers coerced employees to resign," rather than simply discharging them. *Suders*, 542 U.S. at 141. By the time Congress began enacting statutes prohibiting employment discrimination in the 1960s, the claim was "solidly established in the federal courts," and it was applied in these new statutory contexts. *Id.* at 141-42.

A constructive discharge claim "involves both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148. At its heart, the claim turns on whether the employee's resignation should be treated as a termination. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the

employee's position would have felt compelled to resign?" *Id.* at 141.

In federal anti-discrimination law, as in other contexts, the doctrine aims to ensure that employers cannot "accomplish indirectly what the law prohibits being done directly" – namely, circumvent various prohibitions against firing employees for discriminatory or retaliatory reasons. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012). For that reason, employees who prove a constructive discharge may recover "all damages available for formal discharge . . . including both backpay and, in fitting circumstances, frontpay." *Suders*, 542 U.S. at 147 n.8.

2. Employees bring thousands of constructive discharge claims to the federal Equal Employment Opportunity Commission (EEOC) every year.[1] These complaints principally arise under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin; the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against older workers; and the Americans with Disabilities Act (ADA), which prohibits discrimination against workers with disabilities. The major employment discrimination statutes all prohibit retaliation against an employee who advanced a prior claim of discrimination. *See* 42

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[1] *See Statutes by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Nov. 19, 2014).

U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA).

These employment discrimination laws share a common approach to enforcement, requiring employees first to pursue their claims through administrative channels before turning to the courts. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1308-09 (10th Cir. 2005). These redress procedures form part of a system "in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). The process includes certain time windows – 180 or 300 days after discrimination occurs for private-sector employees, 45 days for federal government employees – within which employees are expected to report discrimination.[2]

Although some aspects of the process are different for federal employees than they are for

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[2] In the federal sector, employees pursuing claims under any of the major employment discrimination statutes "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). In the private sector, "[a] charge . . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if state proceedings are also initiated, "within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier." 42 U.S.C. § 2000e-5(e)(1) (Title VII); *see also* 42 U.S.C. § 12117(a) (incorporating the Title VII process for ADA complaints); 29 U.S.C. § 626(d)(1) (setting forth the same time limits for ADEA complaints).

private-sector employees, courts regularly apply timeliness and other procedural rules recognized in one sector to the other. *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 981-82 (7th Cir. 2008) (finding that a timeliness rule developed in a private sector context "provides the appropriate standard" in federal-sector cases); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that equitable tolling rules "applicable to suits against private defendants should also apply to suits against the United States"). For both categories of employees, a failure to initiate a complaint in the administrative process within the applicable timeframe creates a nonjurisdictional bar to any later suit. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

B. Factual And Procedural Background

1. This case turns on a timeliness defense asserted by the Postal Service to defeat petitioner Marvin Green's constructive discharge claim.

In 2008, Mr. Green, then postmaster for Englewood, Colorado, applied for a promotion. Pet. App. 29a. Building on a thirty-five year career in which he began as a letter carrier and rose through the ranks of the Postal Service, Mr. Green sought to fill a recently vacated postmaster position in nearby Boulder, Colorado. Appellant's Court of Appeals Appendix (CA10 App.) 32; Pet. App. 3a. Despite an unblemished record, he was passed over for the job. *Id.* Believing that the person hired was less experienced and had not even submitted an application, CA10 App. 34, Mr. Green thought he was being discriminated against because he is black. Pet.

App. 3a. He contacted a Postal Service EEO counselor to have his concerns investigated. *Id.*

Relations with his supervisors soured in the wake of his discrimination complaint. Pet. App. 3a. In 2009, while his complaint proceeded through administrative channels, Mr. Green expressed concern that he was the victim of retaliation, twice seeking help from Postal Service EEO counselors. *Id.* Things came to a head in November of that year. Shortly after the EEOC assigned an administrative law judge to oversee discovery concerning the nonpromotion, *see* CA10 App. 673-77, Mr. Green received a one-page letter from his Postal Service superiors, summoning him to appear for an "investigative interview" and suggesting that he consider having a union representative present, *id.* 433.

At that meeting, held on December 11, 2009, Postal Service supervisors confronted him with various mismanagement allegations, most seriously accusing him, without any prior notice, of "intentionally delaying the mail" – a criminal charge. CA10 App. 714-15, 804. Agents from the Postal Service's Office of the Inspector General (OIG), who had been contacted about the mail-delay charge, also showed up at the December 11 meeting to investigate, and Mr. Green was ordered to meet with them. Pet. App. 4a. Finally, citing Mr. Green's alleged "[d]isruption of day-to-day postal operations," his superiors reassigned him, effective immediately, to "Emergency Placement in Off-Duty Status." CA10 App. 600. They informed him that he could not return to duty until "the cause for nonpay status cease[d]" and suspended his pay. *Id.* 600, 795.

Rattled, Mr. Green sought help from his union representative, who in turn entered into a flurry of negotiations with a senior human resources manager, David Knight. Pet. App. 5a. While the negotiations unfolded, Mr. Green remained without pay, on indefinite leave, and, he believed, under threat of criminal prosecution.

In fact, "[u]nknown to Green, the OIG agents had concluded at the end of the [December 11] interview that Green had not intentionally delayed the mail." Pet. App. 5a. Nevertheless, the next day, Mr. Knight told Mr. Green's union representative that "the OIG is all over this" and the charge is a "criminal issue" that "could be a life changer." CA10 App. 974.

After several days of back-and-forth, a deal was struck and signed on December 16, 2009. Pet. App. 5a. Under the agreement, Mr. Green's emergency placement ended, and he was allowed to use accumulated annual and sick leave to receive his then-current salary through March. CA10 App. 610. But he was also removed from his Englewood position and demoted to a placement in Wamsutter, Wyoming. Pet. App. 5a. The agreement required him to either "report for duty in Wamsutter . . . on April 1" or "take all necessary steps to effect his retirement on or before March 31." CA10 App. 610. If he had reported to Wamsutter, his pay would have been cut by nearly $40,000 per year. *Id.* 73. In sum, Mr. Green "could choose either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a.

After spending January 2010 going through the Postal Service's internal EEO process to challenge the original emergency placement decision – without

success – Mr. Green submitted his resignation on February 9, effective on the last day of March. Pet. App. 6a.

2. Mr. Green contacted an EEO counselor on March 22, forty-one days after his February 9 resignation. Pet. App. 6a. He alleged that, given the choice he was forced to make, he had been constructively discharged in retaliation for protected Title VII activity. CA10 App. 722-25. The agency accepted the complaint for investigation. Pet. App. 6a-7a.

The parties agree that Mr. Green's complaint of constructive discharge, if timely, properly initiated the EEO process. They also agree that Mr. Green thereafter timely pursued the remaining administrative remedies available to him. *See* CA10 App. 40, 199.

3. Mr. Green then filed suit in the District of Colorado against respondent, the Postmaster General. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343.

Mr. Green alleged, in five distinct claims, unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 7a. Three of those claims were dismissed on procedural grounds by both the district court and the Tenth Circuit and are not at issue here. *Id.* 2a, 7a. The district court also dismissed another claim based on Mr. Green's placement on "emergency" unpaid leave for five days, but the Tenth Circuit reversed the lower court's finding that the placement was not adverse and remanded. *Id.* 23a-27a. That claim also is not before this Court.

Regarding the claim at issue here – Mr. Green's constructive discharge – the district court found that his signing the December 16 agreement triggered the forty-five-day filing period, even though the agreement left him a choice between retirement and relocation to Wyoming. Pet. App. 37a-39a. The district court concluded that when the agreement was signed the Postal Service's conduct had "culminated" and the writing was on the wall. *Id.* Because Mr. Green had not initiated contact with an EEO counselor on his constructive discharge claim within forty-five days of that date, the court held, his claim was time-barred. *Id.*

4. The Tenth Circuit affirmed, holding, as a general proposition, that the filing period for a constructive discharge claim begins to run from the time of the employer's alleged "last discriminatory act" said to give rise to the resignation, not from the resignation itself. Pet. App. 15a-22a.

The court of appeals recognized that other circuits have embraced a different rule – that the filing period begins "on the date the employee resigned." Pet. App. 19a. And it acknowledged that its decision was at odds with the practical reality that a claim for constructive discharge "cannot be submitted before the employee quits his job." *Id.* 22a.

But concerned that the other circuits' position would "allow[] the employee to extend the date of accrual indefinitely," the Tenth Circuit rejected the date-of-resignation rule. Pet. App. 20a-22a. The panel instead joined two other circuits in holding that the limitations period is triggered by the "last discriminatory act" of the employer allegedly giving rise to the resignation. *Id.* 20a. Finding that Mr.

Green could not show that "the Postal Service did anything more to him after December 16," the panel held that his March 22 contact with an EEO counselor was outside the forty-five-day limitations period. *Id.* 22a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Intractably Split Over When The Filing Period For A Constructive Discharge Claim Begins To Run.

The courts of appeals are divided over which of two conflicting rules governs when the filing window for a constructive discharge claim opens under federal employment discrimination law. The Tenth Circuit's decision deepened that split, which will not be resolved without this Court's definitive guidance.

A. Five Courts Of Appeals Have Held That The Filing Period Starts When An Employee Resigns.

1. A majority of the circuits to have considered the question have ruled that the filing period for a constructive discharge claim begins to run on the date the employee resigns. In declining to adopt that approach, the Tenth Circuit acknowledged that its view is at odds with the established rule of several other circuits. Pet. App. 19a.

The Fourth Circuit first articulated the majority rule over twenty-five years ago. It held that "resignation *is* a constructive discharge – a distinct discriminatory 'act' for which there is a distinct cause of action." *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987) (emphasis added). Young resigned from work eight

days after her employer's discriminatory conduct resulted in her suspension. *Id.* at 237. The district court decision below had measured the time period from the suspension date and dismissed the claim. *Id.* at 238-39.[3] But because the court treated Young's resignation as an "act" of her employer, it concluded that she had timely filed her claim and reversed. *Id.* at 237-39.

The Ninth Circuit has reached the same conclusion, holding, "like the Fourth Circuit, that in constructive discharge cases periods of limitation begin to run on the date of resignation." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998).

Expressly "agree[ing] with the Ninth Circuit," the Second Circuit in *Flaherty v. Metromail Corp.*, 235 F.3d 133 (2000), held that the filing period begins when an employee gives "definite notice of her intention to retire" – a rule, the court emphasized, that "should be the same in all cases of constructive discharge." *Id.* at 138. The court made clear that the date of notice – and not the employee's last day at work several months later or any act of the employer – started the filing period. *Id.* at 138-39.

In addition to those three circuits, which the Tenth Circuit acknowledged have adopted a date-of-resignation rule, Pet. App. 19a, the First and Eighth Circuits have adopted the same rule. In *Hukkanen v.*

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[3] *See Young v. Nat'l Ctr. for Health Servs. Research*, 704 F. Supp. 88, 88 & n.* (D. Md. 1988) (setting forth relevant dates), *aff'd*, 887 F.2d 1082 (4th Cir. 1989), *cert. granted, judgment vacated*, 498 U.S. 1019 (1991).

Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101, 3 F.3d 281 (8th Cir. 1993), the Eighth Circuit held that an employee's discrimination charge was timely after concluding that her employer's "last act of discrimination against [her] *was* her constructive discharge," or forced resignation. *Id.* at 285 (emphasis added). Hukkanen was subjected to sex discrimination through August 1984. *Id.* She resigned in October and filed her EEOC charge in March 1985. *Id.* Given the 180-day filing period, her charge was timely when measured from the date of resignation. But it would have been untimely if measured from the employer's alleged last act of discrimination, as the Tenth Circuit's rule would have required.

Similarly, the First Circuit has held that, for a constructive discharge claim, "the limitations period commenced when the employees elected to participate" in an early retirement program. *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998). There, American Airlines had presented a "'take it or leave it'" choice of retiring early or risking involuntary termination – its sole allegedly discriminatory act – to all the employees on the same date, but it gave them roughly two months to decide whether to accept. *Id.* The court used the various individual dates on which each employee submitted his or her formal resignation as the beginning of the filing periods. *Id.* at 123 & n.12.

2. The Tenth Circuit was wrong when it suggested that "[p]erhaps" the conflicting cases it had identified from other circuits "could be distinguished

on the ground that the last act of discrimination was within the limitations period." Pet. App. 20a.

In *Young*, for example, the claim was timely only because the Fourth Circuit measured the filing window from the date the employee officially resigned. 828 F.2d at 238. At the time, federal employees like Young and Green had thirty days to contact an EEO counselor. *See id.* at 237 Young filed her EEO claim thirty-seven days after her suspension – the employer's last act giving rise to her resignation. *See id.*; *Young*, 704 F. Supp. at 88 n.* She resigned, however, twenty-nine days before she filed, and, on that basis, the claim was timely. *Young*, 828 F.2d at 238.

Moreover, in the Eighth Circuit's decision in *Hukkanen* – which the Tenth Circuit did not discuss – the offending conduct extended through August, the employee resigned at the end of October, and she filed an EEOC charge the following March. 3 F.3d at 285. Given the 180-day filing window, had the court applied the Tenth Circuit's rule, the clock would have run out in February, making her March charge untimely. *See id.*

In any case, the remaining decisions cited by the Tenth Circuit cannot be "distinguished" because each establishes a generally applicable rule governing future constructive discharge cases. The Ninth Circuit expressly adopted the general rule established by the Fourth Circuit in *Young*. *See Draper*, 147 F.3d at 1111. And the Second Circuit, as noted, stated that its date-of-resignation rule "should be the same in all cases of constructive discharge." *Flaherty*, 235 F.3d at 138.

In sum, had Mr. Green been employed in any of the circuits that have a date-of-resignation rule, binding precedent would have rendered his claim timely and required it to be resolved on its merits.

B. Three Courts Of Appeals, Including The Tenth Circuit Below, Have Rejected The Majority Rule.

By contrast, in three circuits, employees like Mr. Green lose their claims before reaching the merits. That is what happened to Mr. Green in the Tenth Circuit, which joined two other circuits in pegging the running of the filing period to "some discriminatory act by the employer within the limitations period." Pet. App. 22a.

The Seventh Circuit was the first to hold that the filing period for a claim of constructive discharge is triggered on the date that an employer "takes some adverse personnel action" against its employee. *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992). It endorsed the district court's conclusion that the employee, who had alleged harassment by a supervisor, did not timely file her claim because she presented it "more than 180 days after her transfer out of [her supervisor's] department, where the last discriminatory act against her took place." *Id.*

The D.C. Circuit adopted the same rule in *Mayers v. Laborers' Health & Safety Fund of North America*, 478 F.3d 364 (D.C. Cir. 2007) (per curiam). Because an employee alleging constructive discharge under the ADA "failed to identify a single act of discrimination or retaliation" within the limitations period – apart from her resignation, which the court

declined to treat as an "act" of her employer – the court dismissed her constructive discharge claim as untimely. *Id.* at 370.

The Court should grant review to resolve this deep and longstanding conflict among the circuits.

II. The Question Presented Is Important To Employees And Employers.

As long as the question presented remains unanswered by this Court, thousands of employees and their employers operate in a legal environment lacking predictability and uniformity. Not only have eight courts of appeals arrived at conflicting rules, but the federal government itself has advanced different positions over the years. This uncertainty should not persist.

1. This Court views timeliness questions under the anti-discrimination statutes as important. Thus, the Court repeatedly has granted review to resolve questions about how time limits apply to employees pursuing employment discrimination claims. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621, 623-32 (2007) (disparate pay claim was untimely); *Nat'l Passenger R.R. Corp. v. Morgan*, 536 U.S. 101, 105 (2002) (hostile work environment claim was timely if underlying conduct outside the statutory period was related to any conduct within it); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 108-09 (2002) (claim initiated but not verified within the applicable filing period was timely); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (equitable tolling applied to federal- and private-sector timeliness requirements alike); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-25 (1988) (300-

day federal filing period applied even when a state-agency charge was untimely under state law); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (time limit for filing administrative claim was non-jurisdictional); *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-59 (1980) (claim was untimely because filing period began when discriminatory decision was made); *Int'l Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 241-44 (1976) (discharge claim was timely given retroactive application of expanded filing window).

The Court should grant review here as well. Thousands of constructive discharge claims are brought each year. In 2013 alone, the EEOC received 4,297 constructive discharge complaints under Title VII, 1,185 under the ADEA, and 1,705 under the ADA.[4] More than 5,000 complaints received by the EEOC in 2013 alleged constructive discharges that, like Mr. Green's, were retaliation for prior protected EEO activity.[5] Agencies and courts must determine the timeliness of each of these administrative complaints, and they cannot do so consistently absent a clear answer as to when the clock starts running.

2. While the split over this question persists, employers' liability for otherwise identical

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[4] *Statutes by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Nov. 19, 2014).

[5] *Bases by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Nov. 19, 2014).

constructive discharge claims varies from circuit to circuit.

Allowing geographical happenstance to affect the timeliness of the thousands of constructive discharge claims brought each year produces untenable results for employers as well as employees. For instance, a company operating both in the District of Columbia, where the D.C. Circuit's rule controls, and in its suburbs, where the Fourth Circuit's rule controls, faces different consequences for otherwise identical constructive discharge claims, depending on the jurisdiction in which those claims arise. Moreover, companies that operate nationwide not only must litigate under both rules, but also face uncertainty in the handful of circuits where no rule has yet been announced.

By contrast, clear and uniform limitation periods vindicate the interests of both employees and employers. Because limitation periods protect employees "who promptly assert their rights" as well as employers "from the burden of defending claims arising from employment decisions that are long past," *Ricks*, 449 U.S. at 256-57, this Court can provide clarity that will benefit all parties and promote proper resolution of claims. Indeed, because constructive discharge claims have "profound consequences in employment litigation, with respect to both liability and damages," there is a particular need to resolve the circuit conflict presented here. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-2 (5th ed. 2012).

3. The Government's own position has been inconsistent, heightening the importance of resolving the question presented.

Although Department of Justice lawyers argued below for what is now the Tenth Circuit's rule, Def. C.A. Br. 40-47, the EEOC has taken a contrary view. In an amicus brief, the EEOC – the federal agency charged with interpreting and enforcing federal employment discrimination law – cited the First, Second, Fourth, and Ninth Circuit decisions that adopted the date-of-resignation rule and *agreed* with them. *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 9-10, 12, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245. The EEOC explained that the "operative date" for opening the filing window is "the date on which the *employee acts* on the option" to retire or risk termination. *Id.* at 10 (emphasis added). In other words, the limitations period begins to run when the employee "'effectively communicate[s] her intention to resign.'" *Id.* at 9 (alteration in original) (quoting *Flaherty v. Metromail Corp.*, 235 F.3d 133, 139 (2d Cir. 2000)). The EEOC went on to say that this approach is correct because "[a]n employee . . . should not have his hand forced before a claim has ripened." *Id.* at 12. Moreover, in its adjudicative capacity, the EEOC has adopted a variation of the date-of-resignation rule, tying the running of the clock to the effective date of an employee's resignation.[6]

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[6] *See* Gard v. Frank, EEOC Doc. No. 05890730, 1989 WL 1007278 (Sept. 8, 1989) (applying the effective-date rule to reverse an agency's dismissal for untimeliness); *see also, e.g.*, [Anonymous] v. Shinseki, EEOC Doc. No. 0120141607, 2014 WL 3697473 (July 18, 2014) (same).

III. This Case Is An Ideal Vehicle For Resolving The Conflict Among The Circuits.

This case provides this Court a particularly suitable vehicle to resolve the question presented.

1. An answer to the question presented will be outcome determinative for Mr. Green's constructive discharge claim. Under the majority rule, Mr. Green's claim would be timely, but under the minority rule, it was time-barred.

2. This case provides an opportunity to distinguish between the employee's resignation and the employer's last discriminatory act said to give rise to the resignation – dates that may overlap in other cases. In cases where the last act said to give rise to the resignation occurs on the same day as the resignation itself, it is impossible to consider the two rules except in the abstract. By contrast, here, these dates are distinct and uncontested, making this case an ideal vehicle for this Court to test the competing theories of timeliness over which the lower courts are divided.

3. A favorable outcome for Mr. Green will enable him to recover "all damages available for formal discharge," including backpay and possibly frontpay as well. *Pa. State Police v. Suders*, 542 U.S. 129, 147 n.8 (2004). By contrast, the remaining claim in the case, now remanded to the district court, allows only for the recovery of damages arising from the five days Mr. Green spent on emergency leave. Thus, his constructive discharge claim is fundamental to the further conduct of his case. *See Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

IV. The Tenth Circuit's Decision Is Incorrect.

The filing period for raising constructive discharge claims should not begin before the employee resigns. The Tenth Circuit's contrary holding – that the period runs from an employer's "last discriminatory act" allegedly giving rise to the resignation – disregards this Court's precedent and the purpose of constructive discharge doctrine. The Court should grant review and reverse the decision below.

1. The majority rule correctly begins the filing period when all elements of a constructive discharge claim are present, consistent with the default rule for limitations periods.

The Court has "repeatedly recognized that Congress legislates against the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham Cnty. Soil & Water Conservation Dist. v. United States* ex rel. *Wilson*, 545 U.S. 409, 418 (2005) (internal quotation marks omitted). This well-established default rule exists in part because "[i]t would clearly be unfair to charge the plaintiff with the expiration of any time before the plaintiff's cause of action could be prosecuted to a successful conclusion." 1 Calvin W. Corman, Limitation of Actions § 6.1 (1991).

Nothing in the relevant federal employment discrimination statutes alters that default rule here. An employee must actually resign to have a valid claim for constructive discharge. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-46 (5th ed. 2012). And because resignation is a

required element of constructive discharge, it makes no sense for the filing period for a constructive discharge claim to begin before the employee has resigned.

The Tenth Circuit's rule, however, allows the filing period to begin before all elements of a constructive discharge claim are present. Accordingly, the court of appeals held that Mr. Green's filing period expired ten days before he resigned. His opportunity to contest his constructive discharge came and went before he had any claim to bring. The majority rule properly rejects this anomalous result.

2. Particularly in light of the EEOC enforcement regime to which its rule applies, the Tenth Circuit erred in adopting an ambiguous standard that is difficult to administer.

Administrability is especially important in the employment discrimination context, where thousands of complaints are considered by administrative agencies and federal courts each year. That principle undergirded this Court's decision in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which held that a 300-day federal filing window applies to employees who lodge complaints with state agencies whether that claim was timely under state law or not. Electing the rule that avoided "embroil[ing] the EEOC in complicated issues" at the threshold stage, the Court rejected an alternative that would have required the EEOC to undertake burdensome case-by-case analyses of state law. *Id.* at 124.

The minority rule adopted by the Tenth Circuit below contravenes this principle by requiring agencies and courts to conduct a nuanced inquiry at the threshold of a constructive discharge case. Determining whether an employer's conduct rises to the level of a discriminatory act is a context-dependent endeavor because the significance of any given act "often depends on a constellation of surrounding circumstances, expectations, and relationships." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (internal quotation marks omitted). By pegging the beginning of the filing period to the employer's last discriminatory act, the minority rule may require an adjudicator to sift through disputed timelines and contested evidence to determine which acts were discriminatory for the purposes of the timing inquiry and when exactly they occurred.

The majority rule, by contrast, is easy to administer. The claim accrues, and the limitations period begins to run, when the employee resigns – a discrete, readily identifiable act. That rule is "easily understood by complainants and easily administered by the EEOC." *Commercial Office Prods.*, 486 U.S. at 124.

To be sure, courts must sometimes inquire into the date of an alleged last discriminatory act. But this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), instructs that whether this inquiry is necessary "varies with the practice" at issue. *Id.* at 110. The "very nature" of a hostile work environment claim, for instance, "involves repeated conduct." *Id.* at 115. As such, courts have no option but to undertake the challenge

of identifying a "last act" among many to determine when a filing period begins. But although such last acts are difficult to ascertain, "[d]iscrete acts such as termination . . . are easy to identify." *Id.* at 114. Indeed, as noted earlier, constructive discharge claims cannot exist until the occurrence of a particular discrete act – the employee's resignation. A last-act rule is both unnecessary and ill-fitting.

3. Clear rules are especially appropriate in a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Commercial Office Prods.*, 486 U.S. at 124.

The need to accommodate laypeople provides "a guiding principle for construing the provisions of Title VII." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), for example, this Court declined to construe Title VII to require that an employment discrimination charge be verified within the filing period, in part to "ensure[] that the lay complainant . . . will not risk forfeiting his rights inadvertently." *Id.* at 115. In other words, "limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Del. State Coll. v. Ricks*, 449 U.S. 250, 262 n.16 (1980).

Under the Tenth Circuit's rule, however, the limitations period begins to run before the employee has resigned. Employees are unlikely to know or even suspect that their filing period is limited in this way, presenting an obstacle nowhere evident in the relevant statutes or regulations. The majority rule, by contrast, gives employees ample opportunity to present meritorious claims.

Aware that its rule could result in employees unwittingly forfeiting valid claims, the Tenth Circuit suggested that employees "could likely amend" earlier-filed administrative charges to include a constructive discharge claim. Pet. App. 22a.

But the possibility of amending is not the panacea the Tenth Circuit envisioned. The need to amend is particularly problematic for laypeople, who likely will not know about it. The Tenth Circuit's approach thus injects a needless additional procedural hurdle at which an employee "risk[s] forfeiting his rights inadvertently," *Edelman*, 535 U.S. at 115. And because constructive discharge is "a distinct discriminatory 'act' for which there is a distinct cause of action," *Young v. Nat'l Ctr. for Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987), some constructively discharged employees will have no earlier complaint to amend.

4. Contrary to the Tenth Circuit's concerns, under the date-of-resignation rule currently prevailing in five circuits, employees have no incentive "to extend the date of accrual indefinitely" or to submit unmeritorious claims. Pet. App. 20a.

There is little reason to believe that delayed suits would materialize. A long-postponed resignation cannot form the basis of a successful constructive discharge claim, absent some compelling reason for waiting. The "freshness of the instances of harassment" affects any adjudication on the merits. *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 n.2 (9th Cir. 1998). Employees, then, have every incentive to bring meritorious claims before they are stale, and courts can easily dispose of claims predicated on long-past conduct on the merits. In the

rare case where it is necessary, employers also can assert a laches defense. *Morgan*, 536 U.S. at 121.

Under the Tenth Circuit's rule, it is *employers* who have an incentive to use delaying tactics – to discourage employees from preserving their claims. Employers seeking to avoid liability for constructive discharge may, for example, propose coercive severance agreements or settlements with fairly long periods for employees to consider their options. The clock would begin to run when the employer imposed the choice, but an unwary employee would not know to file a constructive discharge complaint before she decided that resignation was the lesser of two evils.

In other words, by tethering the running of the clock to alleged acts of the employer, the Tenth Circuit's rule encourages what the constructive discharge cause of action seeks to curb – that is, it enables employers to "accomplish indirectly what the law prohibits being done directly," Lindemann, *supra*, 21-33.

5. Contrary to the Tenth Circuit's suggestion, the majority rule better comports with this Court's reasoning in *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Ricks held that the filing period begins with the occurrence of the discriminatory act at issue – in that case, an employer's decision to deny tenure – and not when a "delayed but inevitable consequence" of that act is felt. 449 U.S. at 257-58. The Tenth Circuit erroneously concluded that *Ricks*' focus on the "'time of the *discriminatory acts*,'" Pet. App. 20a (quoting *Ricks*, 449 U.S. at 258), precluded the use of the

employee's resignation date as the beginning of the limitations period for a constructive discharge claim.

But the Tenth Circuit's analysis overlooks an important aspect of constructive discharge doctrine. It is well established that a "constructive discharge involves *both* an employee's decision to leave *and* precipitating conduct." *Suders*, 542 U.S at 148 (emphases added). For this reason, an employee's resignation cannot be "inevitable" – and the discriminatory act of constructive discharge cannot be complete – until the employee elects to depart rather than tolerate the working conditions created by the employer. Here, for example, Mr. Green's resignation did not become inevitable until he actually decided to retire rather than relocate to Wyoming.

By contrast, the majority rule correctly recognizes that a constructive discharge is itself a discriminatory act, not a delayed but inevitable consequence of prior discrimination. Indeed, the EEOC has interpreted *Ricks* consistent with this view.[7] A faithful application of *Ricks* yields the majority rule: the limitations period for a constructive discharge claim can only begin once the employee has resigned.

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[7] *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 5-8, 10-11, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 (citing *Ricks*, 449 U.S. at 257-58).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARVIN GREEN, Plaintiff-Appellant, v. PATRICK R. DONAHOE, Postmaster General, United States Postal Service, Defendant-Appellee.	No. 13-1096

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 1:10-CV-02201-LTB-KMT)

John Mosby, (Elisa Moran and Marilyn Cain Gordon with him on the briefs), Denver, Colorado, for Plaintiff-Appellant.

Paul Farley, Assistant United States Attorney, (John F. Walsh, United States Attorney, with him on the brief), Denver, Colorado, for Defendant-Appellee.

Before HARTZ, McKAY, and MATHESON, Circuit Judges.

HARTZ, Circuit Judge.

Marvin Green, a former postmaster, claims that the U.S. Postal Service retaliated against him after he made employment-discrimination claims. He was investigated, threatened with criminal prosecution, and put on unpaid leave. Shortly after being put on leave, he signed a settlement agreement with the Postal Service that provided him paid leave for three and a half months, after which he could choose either to retire or to work in a position that paid much less and was about 300 miles away. Ultimately, he decided to retire. He then filed a complaint against Defendant Patrick Donahoe, the Postmaster General, in the United States District Court for the District of Colorado, alleging five retaliatory acts in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.: (1) a letter notifying him to attend an investigative interview; (2) the investigative interview; (3) a threat of criminal charges against him; (4) his constructive discharge; and (5) his placement on unpaid leave (also known as emergency placement). The district court dismissed the first three claims for failure to exhaust administrative remedies. On the two remaining claims it granted summary judgment for Defendant, ruling that the constructive-discharge claim was untimely and that emergency placement was not a materially adverse action. This appeal followed.

We have jurisdiction under 28 U.S.C. § 1291. We affirm the judgment below except for the emergency-placement claim. We agree with Green that the emergency placement was a materially adverse action (being put on unpaid leave would dissuade a reasonable employee from engaging in protected

activity), and we remand the claim for further proceedings.

I. BACKGROUND

Green, who describes himself as a black American, began working for the Postal Service in 1973. He was a manager for 25 years, including 14 years as a postmaster. From 2002 until his retirement in 2010, he was the postmaster at the Englewood, Colorado, post office. At the time of the pertinent events, he had no disciplinary report in his permanent file.

In early 2008 a postmaster position opened in Boulder. Green applied for the position, but his supervisor, Gregory Christ, selected a Hispanic instead. In August 2008, Green filed a formal charge with the Postal Service's Equal Employment Opportunity (EEO) Office, alleging that he had been denied a promotion because of his race. That November, after the EEO Office had completed its investigation, Green requested a hearing before the Equal Employment Opportunity Commission (EEOC). The matter was settled.

In May 2009, Green filed an informal EEO charge alleging that the Postal Service had begun retaliating against him for his prior EEO activity. He alleged that Christ, his supervisor, had threatened, demeaned, and harassed him. He filed a similar informal charge in July, alleging that Christ and Jarman Smith, who had replaced Christ as Green's supervisor, had threatened, demeaned, and harassed him because of his race and his EEO activity regarding the Boulder position. In August the Postal Service's EEO Office completed its

investigation of the May and July charges. It informed Green that he could file a formal charge, but he did not do so.

In November 2009, Green received a letter at his home from Charmaine Ehrenshaft, who was the Postal Service's Manager of Labor Relations for his district. The letter instructed Green "to appear for an investigative interview regarding allegations of non-compliance in the grievance procedure." Aplt. App., Vol. 2 at 433. The letter provides no specifics, but Defendant claims that Green was derelict in his handling of employee grievances between April and December of 2009, resulting in multiple adverse decisions that required the Postal Service to pay damages and penalties to grievants. Green asserts that he and his facility managers had contacted the appropriate person for assistance with the grievances but that the person would not help.

Ehrenshaft and her supervisor, David Knight, the Manager of Human Resources, conducted the investigative interview on December 11, 2009. Green was represented by Robert Podio of the National Association of Postmasters. During the interview Knight asked Green about the processing of grievances, about allegations that he had intentionally delayed the mail by failing to timely sign and return receipts for certified letters related to the grievances, and about allegations that he had sexually harassed a female employee.

When the interview ended, two agents from the Postal Service Office of the Inspector General (OIG) arrived. Knight instructed Green to meet with them.

The OIG, an independent branch of the Postal Service, had initiated its own investigation into delay of the mail, which can be a federal crime.

Knight and Ehrenshaft reappeared when the OIG interview ended. They gave Green a letter informing him that under the Postal Service's emergency-placement policy he was "placed in off-duty status immediately" because of "[d]isruption of day-to-day postal operations." *Id.*, Vol. 3 at 600. It stated that under the policy "[t]he employee is returned to duty status when the cause for nonpay status ceases." *Id.* Knight ordered Green to surrender his Postal Service identification and cell phone and not to return to the Englewood post office.

Unknown to Green, the OIG agents had concluded at the end of the interview that Green had not intentionally delayed the mail. The next day, Podio began negotiating with Knight to resolve the matter. During negotiations Knight e-mailed Podio that the OIG was "all over" the delay-of-mail issue and that "the criminal issue could be a life changer." *Id.*, Vol. 5 at 974.

On December 16, 2009, Green signed a settlement agreement. It provided that he would immediately give up his position as the Englewood postmaster and that he would use accrued annual and sick leave to receive pay until March 31, 2010, after which he could choose either to retire or to accept a position at significantly lower pay in Wamsutter, Wyoming, about 300 miles away. In exchange, the Postal Service agreed that "no charges will be pursued based on the items reviewed during interviews conducted on December 11, 2009."

Id., Vol. 3 at 610. After Green signed, he was paid retroactively for the three days he had been on emergency placement.

On January 7, 2010, Green met with an EEO counselor and filed an informal charge alleging that he had been retaliated against on December 11, the day of the investigative interview, when he was removed from his postmaster position and was issued the emergency-placement letter. He filed the follow-up formal charge on February 17. The EEO Office dismissed the claim a few days later because Green had entered into a settlement agreement. The EEOC upheld the dismissal in August.

On February 9, 2010, Green submitted his retirement papers, effective March 31, 2010. On March 22 he initiated counseling. The Information for Pre-Complaint Counseling that he signed on March 31 alleged that he had been constructively discharged by being forced to retire. On April 23 he followed up with another formal charge. The EEO Office sent Green a letter on April 26 indicating that it had accepted three claims for investigation: (1) that he was constructively discharged (no date specified); (2) that he was downgraded from a level 22 postmaster to a level 13 postmaster on December 19, 2009; and (3) that his pay-for-performance salary increase was stopped. Green's attorney then sent the EEO Office a letter advising it that "the only issue that should be investigated by you is the constructive discharge claim," because the other two claims had been raised in the earlier February 17 charge and dismissed. *Id.*, Vol. 1 at 83. The EEO Office issued a second acceptance letter acknowledging Green's request and

stating that it would investigate only the constructive-discharge claim.

In September 2010 Green filed his complaint in this lawsuit. He filed an amended complaint in July 2011 alleging five retaliatory acts in violation of Title VII: (1) the letter notifying him of the investigative interview, (2) the investigative interview, (3) the threat of criminal prosecution, (4) his constructive discharge, and (5) the emergency placement.

The district court dismissed the first three claims for lack of subject-matter jurisdiction, ruling that Green had not exhausted his administrative remedies because he had not adequately presented those claims in his EEO charges. It later found that Ehrenshaft had in bad faith destroyed records of postal employees charged with misconduct similar to that alleged against Green. As a sanction, the court said that it would inform the jury that it could infer pretext from the destruction and would consider the same inference in ruling on a pending summary-judgment motion. The possible sanction was mooted, however, because in February 2013 the district court granted summary judgment for Defendant on the remaining claims. It ruled that Green's emergency placement was not a materially adverse employment action and that his constructive-discharge claim was time-barred because he had not contacted an EEO counselor about it within 45 days of December 16, 2009, when he signed the settlement agreement. Green appeals the disposition of all five claims.

II. DISCUSSION

A. Title VII Administrative Procedures

A brief summary of administrative procedures under Title VII will help set the stage. To avoid confusion when reading Title VII case law, it is worth noting that the obligations of federal employees are somewhat different from those of other workers. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1311 (10th Cir. 2005). *See generally Laber v. Harvey*, 438 F.3d 404, 416-17 & n.9 (4th Cir. 2006). For private-sector employees, a charge of discrimination must be filed with the EEOC within 180 days, although the time can be extended to as much as 300 days if the claim is pursued initially with a state or local agency empowered to prosecute discriminatory employment practices. *See* 42 U.S.C. § 2000e-5(e)(1).[1] If the EEOC finds no discrimination or is unsuccessful at resolving the claim, the employee can then seek

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[1] The pertinent language of the paragraph is as follows:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred , except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier

42 U.S.C. § 2000e-5(e)(1).

judicial review. *See id.* § 2000e-5(f)(1). Federal employees, however, must begin the process by contacting within 45 days an EEO counselor in the employee's agency. *See* 29 C.F.R. § 1614.105(a)(1).[2] If the counselor does not resolve the matter, the employee can file a charge with the employing agency. *See id.* § 1614.106. Once the agency has investigated and issued a final decision, the employee can either appeal to the EEOC and then pursue judicial review, or opt out of further administrative proceedings and

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[2] Section 1614.105(a) states in full:

> Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.
>
> (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105(a).

file directly in court. *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.108-.110, 1614.401, 1614.407

B. Exhaustion

Before filing suit under Title VII, a private plaintiff must exhaust administrative remedies. "[E]ach discrete incident of alleged discrimination or retaliation constitutes its own unlawful employment practice for which administrative remedies must be exhausted." *Jones v. UPS, Inc* 502 F.3d 1176, 1186 (10th Cir. 2007) (internal quotation marks omitted). Two components of the exhaustion requirement are at issue in this case. The first relates to the content of the administrative charge. To establish exhaustion, a Title VII plaintiff must show that the claim is within the scope of the administrative investigation that could reasonably be expected to follow from the allegations raised in the charge. *See id.* Thus, "the charge must contain facts concerning the discriminatory and retaliatory actions underlying each claim." *Id.* Second, the plaintiff must submit the administrative charge in a timely fashion. *See Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1325-28 (10th Cir. 2002); *Johnson v. Orr*, 747 F.2d 1352, 1356-57 (10th Cir. 1984). Exhaustion serves the dual purposes of "protect[ing] employers by giving them notice of the discrimination claims being brought against them" and "providing the EEOC [or EEO office] with an opportunity to conciliate the claims." *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1195 (10th Cir. 2004).

In this circuit the failure to comply with the first component of exhaustion deprives the court of

jurisdiction. *See Jones v. Runyon*, 91 F.3d 1398, 1399 (10th Cir. 1996) (Title VII claim by Postal Service employee). But the untimeliness of an administrative claim, although an exhaustion issue, *see Sizova*, 282 F.3d at 1327, is not jurisdictional, *see id.* at 1325.

Defendant filed a motion under Fed. R. Civ. P. 12(b)(1) to dismiss Green's first three claims – based on the letter notifying him of the investigative interview, the investigative interview itself, and the threat of criminal charges – for lack of jurisdiction because Green had not presented them administratively. The district court granted the motion. Defendant then moved for summary judgment on Green's constructive-discharge claim on the ground that it was untimely. The court granted that motion as well. The court based both rulings on undisputed facts regarding the content and timing of Green's administrative charges. Our review of both rulings is de novo. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (dismissal for lack of jurisdiction); *Dahl v. Dahl*, 744 F.3d 623, 628 (10th Cir. 2014) (summary judgment). The district court's consideration of the administrative pleadings when ruling on the Rule 12(b)(1) motion was proper. *See Holt*, 46 F.3d at 1003 (court has "wide discretion" to consider documents "to resolve disputed jurisdictional facts under Rule 12(b)(1)"). We affirm the district court's rulings on exhaustion, but our reasoning differs from the district court's on the threat-of-criminal-charge claim.

1. Notice and Interview Claims

Green's charge submitted to the EEO Office on February 17, 2010, alleged retaliation and harassment on December 11, 2009, when he was removed from his position and placed on off-duty status. He contends that his claims based on the investigative interview and the letter notifying him of the interview were within the scope of that charge because the investigation into the charge would have included an investigation into the letter and the interview. We disagree.

The February 17 charge does not mention the letter at all, and the single reference to the interview is only that Smith "was not involved." Aplt. App., Vol. 1 at 60. Because the charge did not contain a description of the letter or the interview that would have caused the EEO Office to investigate them as separate instances of discrimination, the district court properly dismissed both claims.

2. Threat Claim

The analysis of Green's third claim – based on the threat of criminal prosecution – is a bit more complicated. The factual basis of the claim is contained in his April 23, 2010 charge. The charge alleges that he was constructively discharged by being forced to retire, and it states that the Postal Service intimidated him with a false threat of criminal charges. Green's unedited statement reads:

> Since filling my changes of discrimination the Agency has engaged in harassing, bulling and attempting to force me to quit or retire. I was forced out of my job as Postmaster Englewood,

> CO EAS-22, by Charmaine Ehrenshaft, or to move to the state of Wyoming about 400 miles from Denver, CO for a Postmaster position EAS-13 without save pay which would be a cut in pay of approximately $38,784.00 dollars and without any relocation cost. They also stopped my 2009, Pay-For-Performance Salary Increase that should have taken place in the month of January 2010. On December 19, 2009, Charmaine Ehrenshaft, downgraded me to an EAS-13 Postmaster Wamsutter, Wyoming. *They also used bulling, harassment, intimidation by possible criminal charges for delay of mail which I never delayed any mail in my Postal Career.*
>
> Alternatively, if I did not retire, a *Criminal Attorney* would cost me to start any where from $25,00.00 to $50,000.00, or if I did not retire, I was ordered to report to the Postmaster position in Wamsutter, Wyoming which is approximately 400 miles from Denver, CO, and be downgraded from a level EAS-22 to a level EAS-13, <u>without saved pay</u>.

Id. at 78 (italics added, bold omitted).

In a later communication, however, Green's attorney limited the charge. About two weeks after Green filed the April 23 charge, the EEO Office sent him a letter accepting his complaint for investigation and stating that the investigation would include only the following issues: (1) that he was forced to retire (constructive discharge), (2) that he was downgraded from a level 22 postmaster to a level 13 postmaster,

and (3) that his pay-for-performance salary increase was stopped. Green's attorney responded with a letter advising that "the only issue that should be investigated by you is the constructive discharge claim." *Id.* at 83. The EEO Office then issued a second acceptance letter acknowledging Green's request and identifying the constructive-discharge claim as the only claim it would investigate. Thus, Green's attorney took the opportunity to correct the EEO Office's erroneous inclusion of two claims not being raised, yet made no mention that another claim had been omitted. The obvious inference is that the charge had not raised any other claims. *See Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 72 (1st Cir. 2011). As a general rule, we have liberally construed administrative pleadings, *see UPS*, 502 F.3d at 1186 (EEOC filing); but that practice is limited to pleadings filed without the assistance of counsel, *see Lyons v. England*, 307 F.3d 1092, 1104 (9th Cir. 2002) ("We are required to construe appellants' EEOC charges with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." (internal quotation marks omitted)); *Mitchell v. City & Cnty. of Denver*, 112 F. App'x 662, 667 (10th Cir. 2004) ("This more lenient pleading standard contemplates the fact that administrative charges . . . are regularly filled out by employees who do not have the benefit of counsel."); *cf. Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (citations and internal quotation marks omitted)).

Nevertheless, the charge may have been adequate. Exhaustion depends on whether "the charge . . . contain[s] facts concerning the discriminatory and retaliatory actions underlying [the] claim." *Jones*, 502 F.3d at 1186. And the April 23 charge certainly contains facts concerning the alleged threat of criminal prosecution. Green did not necessarily withdraw his factual allegations when he withdrew all his claims other than constructive discharge; he may have based that claim in part on any discriminatory act against him, including the alleged threat of prosecution. Hence, we are reluctant to affirm dismissal of this claim on the ground that it was not included in his charge.

Green's escape from dismissal, however, is short-lived. The claim was untimely. Under 29 C.F.R. § 1614.105(a)(1), a federal employee "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." It is undisputed that the alleged threat of criminal prosecution occurred in December 2009. The March 2010 consultation was well past the 45-day deadline.

3. Constructive-Discharge Claim

"Constructive discharge occurs when an employer unlawfully creates working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1133 (10th Cir. 2013) (internal quotation marks omitted). Green claims that harassment and bullying by the Postal

Service forced him to retire. The district court, however, held that the claim was time-barred because all the allegedly discriminatory actions occurred by December 16, 2009, so his March 22, 2010 contact with the EEO office about his constructive discharge was beyond the 45-day deadline of 29 C.F.R. § 1614.105(a)(1). We agree with the district court.

Green argues that the 45-day limitations period did not begin to run until he announced his resignation, even though that was well after the last alleged discriminatory act against him. In our view, however, the start of the limitations period for constructive-discharge claims is the same as for other claims of discrimination.

To reach that conclusion, we begin by reviewing the rationale behind recognition of constructive discharge as a distinct claim. The chief function of such a claim is to expand the remedies available to an employee subjected to improper employer conduct. Ordinarily, an employee who quits a job after employer misconduct is treated as having voluntarily left the employment and is not entitled to reinstatement or to damages, such as back pay, resulting from having left the job. *See Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1236-37 (10th Cir. 2000) (employees who resigned after being sexually harassed were not entitled to back or front pay because they had not been constructively discharged); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 342 (10th Cir. 1986) ("[T]he remedies of back pay and reinstatement are not available . . . unless [the plaintiff] was constructively discharged."). But employers should not be able to escape such remedies simply by making the job so intolerable that the

employee resigns, making it unnecessary to fire him. *See* 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012) ("An employer . . . should not be able to accomplish indirectly what the law prohibits being done directly."). To deal with that circumstance, various tribunals have embraced the concept of constructive discharge. Apparently the first to do so was the National Labor Relations Board (NLRB) in the 1930s in the context of alleged unfair labor practices. *See Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). If there had been a constructive discharge, the NLRB could order reinstatement and backpay, remedies otherwise available only if the worker had been fired. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 888, 902 (1984) (holding that NLRB could order reinstatement with back pay as a remedy for constructive discharge); *In re Sterling Corset Co., Inc.*, 9 N.L.R.B. 858, 871 (1938) (ordering reinstatement and back pay as a remedy for constructive discharge). Courts have since recognized constructive-discharge claims in a variety of contexts, including Title VII, to enhance damages. *See Suders*, 542 U.S. at 142. Courts treat "a constructive discharge [as] functionally the same as an actual termination *in damages-enhancing respects*." *Id.* at 148 (emphasis added).

But when should a constructive-discharge claim accrue? For most federal limitations periods, "the clock starts running when the plaintiff first knew or should have known of his injury." *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1176 (10th Cir. 2011). In the employment-discrimination context, "this rule generally means that a claim accrues when the

disputed employment practice – the demotion, transfer, firing, refusal to hire, or the like – is first announced to the plaintiff." *Id.* at 1177. Unlike formal discharges, however, "[a] constructive discharge involves *both* an employee's decision to leave and [the employer's] precipitating conduct." *Suders*, 542 U.S. at 148 (emphasis added). This feature creates interesting issues regarding when such a claim accrues, and hence when a claim is untimely.

The interesting issue here is whether the date of accrual can be postponed from the date of the employer's misconduct until the employee quits or announces his future departure. Supporting such postponement is that quitting is an element of the claim, *see Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010) ("To recover for constructive discharge, . . . an employee generally is required to quit his or her job."), and generally a claim does not accrue before all its elements can be satisfied, *see Wallace v. Kato*, 549 U.S. 384, 388 (2007) ("[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action." (brackets and internal quotation marks omitted)).

Few court opinions have discussed the issue, either under Title VII or in other contexts. Of these, it appears that the majority have said that the constructive-discharge claim accrued when the employee gave notice of departure. In most of these decisions, however, the court had no occasion to choose between the date of the employer's last misconduct and the employee's resignation announcement. *See, e.g., Jeffery v. City of Nashua*, 48 A.3d 931, 936 (N.H. 2012) (plaintiff unsuccessfully argued that claim

accrued on effective date of resignation, not when she gave notice of resignation); *Patterson v. Idaho Dept. of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) (same); *Whye v. City Council*, 102 P.3d 384, 387 (Kan. 2004) (same); *Hancock v. Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994) (same).

Still, in several decisions under Title VII, courts have said that a claim accrued on the date the employee resigned. *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *Young v. Nat'l Center for Health Servs. Research*, 828 F.2d 235, 237-38 (4th Cir. 1987). The reasoning in *Young* was as follows:

> [*T*]*he applicable administrative deadlines run from the time of the discriminatory act*, not from the time of a later, inevitable consequence of that act. Whether an employer's action is a "discriminatory act" or merely an "inevitable consequence" of prior discrimination depends on the particular facts of the case. A resignation is not itself a "discriminatory act" if it is merely the consequence of past discrimination, but *if the employer discriminates against an employee and purposely makes the employee's job conditions so intolerable that a reasonable person would feel forced to resign, then the resignation is a constructive discharge – a distinct discriminatory "act" for which there is a distinct cause of action.*

828 F.2d at 237-38 (emphasis added) (citations omitted); *accord Draper*, 147 F.3d at 1110-11 (quoting *Young*); *Flaherty*, 235 F.3d at 138 (quoting *Young* and saying that cause of action accrued when employee gave notice of intent to retire).

Perhaps these decisions of our sister circuits could be distinguished on the ground that the last act of discrimination was within the limitations period. But in any event, we cannot endorse the legal fiction that the employee's resignation, or notice of resignation, is a "discriminatory act" of the employer. Such a fiction stretches the language of 29 C.F.R. § 1614.105(a)(1) too far. The regulation provides that federal employees "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action,[3] within 45 days of the effective date of the action." *Id.* And the Supreme Court has said that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (internal quotation marks omitted). "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257. Of particular concern is that delaying accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential

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[3] We are uncertain of the meaning of *personnel action* in the regulation, but we have no doubt that it must refer to the acts of the employer, not the employee, and Green has not suggested that his notice of resignation was a personnel action under the regulation.

feature of limitations periods by allowing the employee to extend the date of accrual indefinitely, thereby "placing the supposed statute of repose in the sole hands of the party seeking relief." *Wallace*, 549 U.S. at 391. As previously noted, the Supreme Court has stated that "a constructive discharge is functionally the same as an actual termination in *damages-enhancing respects*." *Suders*, 542 U.S. at 148 (emphasis added). It does not follow, however, that it should be treated as the functional equivalent for purposes of the limitations period.

No policy reason, certainly not the policy behind recognition of constructive-discharge claims as a means to provide appropriate relief to employees, commends itself as a ground for postponing the accrual of constructive-discharge claims until the employee leaves work. Such postponement would be contrary to the proposition that "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships." *Derr*, 796 F.2d at 342-43 (internal quotation marks omitted).

There is certainly merit to the view that the employee should have time to contemplate whether the employer's misconduct has become intolerable. But the employee need not raise the claim instantaneously. The limitations period provides time for contemplation. Indeed, the EEOC took this consideration into account in setting the 45-day limit for claims, despite arguments that more time was necessary "to reflect, secure advice, or realize the impact of a discriminatory action." 57 Fed. Reg. 12634,

12634 (Apr. 10, 1992). It is not our office to expand the time limits beyond what the EEOC has set.

We recognize that an employee cannot file suit before presenting a charge in administrative proceedings, and a constructive-discharge charge cannot be submitted before the employee quits his job. But exhaustion of a Title VII claim requires only that "the charge . . . contain facts concerning the discriminatory and retaliatory actions underlying [the] claim." *Jones*, 502 F.3d at 1186. The charge need not allege that the employee responded to the improper action by quitting. And an employee who later decides he cannot take it any longer and therefore quits his job could likely amend a timely charge to include an allegation of constructive discharge. *See* 29 C.F.R. § 1601.12(b) (permitting amendments).

We therefore agree with the courts that have required some discriminatory act by the employer within the limitations period. *See Mayers v. Laborers' Health & Safety Fund*, 478 F.3d 364, 367, 370 (D.C. Cir. 2007) (notice of resignation was within limitations period but no discriminatory act of employer was); *Davidson v. Ind.-Am. Water Works*, 953 F.2d 1058, 1059-60 (7th Cir. 1992) (same).[4]

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[4] The Seventh Circuit later described *Davidson* as agreeing with *Flaherty* and *Draper*. *See Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 334 (7th Cir. 2004) ("Like other circuits, we have held that the clock starts with the events that constitute a constructive discharge."). But *Cigan* held that the employee had not been constructively discharged, *see id.*, and it did not purport to overrule *Davidson*.

Green does not claim that the Postal Service did anything more to him after December 16, 2009, the day he signed the settlement agreement. He first initiated EEO counseling on his constructive-discharge claim on March 22, 2010, well beyond 45 days later. That was too late.

C. Emergency-Placement Claim

Finally, we consider the emergency-placement claim. The district court dismissed the claim on summary judgment. "We review the district court's grant of summary judgment de novo, applying the same standards that the district court should have applied." *Dahl*, 744 F.3d at 628 (internal quotation marks omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(a). "[W]e examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Dahl*, 744 F.3d at 628 (internal quotation marks omitted).

Green claims that his emergency placement was retaliation for his protected conduct of filing his 2008 EEO charge (which alleged that the Postal Service discriminatorily denied him the Boulder postmaster position) and his 2009 charge (which alleged that the Postal Service retaliated against him for his 2008 charge). An employee who does not have direct evidence of retaliation may prove such a claim under the three-step framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 655 (10th Cir.

2013). The employee must first establish a prima facie case that the action taken by the employer was retaliation for protected conduct by proving "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008) (internal quotation marks omitted). The challenged action is materially adverse if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted). If the prima facie case is made, the burden shifts to the employer to respond with "legitimate, nonretaliatory reasons" for its actions. *Debord*, 737 F.3d at 655 (brackets and internal quotation marks omitted). If the employer does so, the burden shifts back to the employee to show that the employer's "stated reasons were pretextual." *Id.*

In granting Defendant summary judgment, the district court held that Green could not prove that his emergency placement was materially adverse. We disagree.

On appeal Defendant argues that the emergency placement was not materially adverse for several reasons: (1) Green does not "take issue" with the district court's determination that there is no evidence that the placement was materially adverse, Aplee. Br. at 40; (2) Green never missed a regular paycheck, so the emergency placement was equivalent to administrative leave, which has not been considered

materially adverse; and (3) Green does not dispute that the placement did not dissuade him from engaging in protected activities.

We are not persuaded. In our view, Green adequately preserved below and on appeal his claim that the placement was materially adverse. As for Defendant's second argument, it misses a key fact: Although Green did not miss a paycheck, he did not know that he would be paid when he was handed the letter notifying him of the emergency placement. The letter referred to the placement as "nonpay status," and said that the status would "continue until you are advised otherwise." Aplt. Appl, Vol. 3 at 600. Green later received his regular paycheck only because he agreed to a settlement with the Postal Service, a settlement that he may have been induced to accept so that he could be paid. Indeed, Knight testified as follows:

> Q. Why did you tell Mr. Podio that you would not pay [Green]?
>
> A. It's my right. If we're going to negotiate a settlement, that's a negotiation tool.

Id., Vol. 5 at 1022. As we have said, "Actions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn." *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998). We do not doubt that losing one's income could "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Somoza*, 513 F.3d at 1212 (internal quotation marks omitted); *see Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012) (postal employee's placement "on unpaid off-duty

status" was an adverse employment action); *Scott v. Potter*, 182 F. App'x 521, 524 (6th Cir. 2006) (expressing "no doubt" that postal employee's emergency placement was an adverse employment action). The possibility that one could recover that income by caving to the employer's demands would not provide much comfort.

Finally, Green's admittedly continuing to engage in protected activities (such as filing more charges) after the emergency placement does not affect our conclusion. True, "the fact that an employee continues to be undeterred in his or her pursuit of a remedy . . . may shed light as to whether the actions are sufficiently material and adverse to be actionable." *Somoza*, 513 F.3d at 1214. But here the obvious consequence of the placement was to induce Green to settle on terms favorable to the Postal Service. And once he had settled (particularly after he decided to quit), there was little the Postal Service could do to retaliate against him for his subsequent claims of discrimination. More importantly, we look at the likely effect of the adverse action on a "reasonable worker." *Id.* at 1212 (internal quotation marks omitted). Green does not lose his claim just because he may be more resilient than most. We repeat that a reasonable worker would be deterred by cutting off his pay.

Whether Green can establish the other elements of his emergency-placement claim and what damages, if any, he may be entitled to ae unclear. Bu we leave that to the district court to decide in the first instance.

III. CONCLUSION

We AFFIRM the district court's dismissal of the claims based on the investigative-interview letter, the investigative interview itself, the threat of criminal charges, and the alleged constructive discharge. We REVERSE summary judgment for Defendant on the emergency-placement claim, and we REMAND for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Case No. 10-cv-02201-LTB-KMT

MARVIN GREEN,

Plaintiff,

v.

PATRICK R. DONAHOE, Postmaster General, United States Postal Service,

Defendant.

ORDER

This matter is before me on the Motion for Summary Judgment [Doc #90], filed by Defendant Patrick R. Donahoe, Postmaster General, United States Postal Service (the "Postal Service"). For the reasons stated below, I GRANT Defendant's motion.

I. Background

This case involves Plaintiff Marvin Green's retaliation claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The full background runs deep and wide, but only a brief recitation of the facts is necessary to resolve the instant motion. What follows is not subject to genuine dispute unless otherwise noted.

A

Plaintiff is an African-American man who began working for the Postal Service in 1973. He advanced

and obtained his first supervisory role in 1985. In 2002 Plaintiff was promoted to an EAS-22 level Postmaster at the Englewood, Colorado post office, which was in the Postal Service's Colorado/Wyoming district. He held this position until retiring on March 31, 2010.

In early 2008, Plaintiff applied for an EAS-24 Postmaster position in Boulder, Colorado. He was not hired. Upset, on July 11, 2008, Plaintiff contacted an Equal Employment Opportunity ("EEO") counselor, and on August 14, 2008, he filed a formal EEO complaint alleging that he had been discriminated against because of his race. He specifically alleged that Gregory Christ, who was Plaintiff's immediate supervisor from 2008 through July 2009 and who was responsible for selecting the Boulder Postmaster, had not hired Plaintiff because of his race. On November 7, 2008, Plaintiff requested a hearing before the Equal Employment Opportunity Commission. This complaint was ultimately resolved through a settlement.

On May 14, 2009, Plaintiff filed an informal EEO complaint alleging that Christ had again discriminated against him because of his race and that Christ had retaliated against him because of his prior EEO activity. Plaintiff alleged that Christ threatened, demeaned, and harassed him.

Plaintiff filed another informal EEO complaint on July 17, 2009. In it he alleged that Christ and Jarmin Smith, who replaced Christ as Plaintiff's immediate supervisor in July 2009, had discriminated against him because of his race and had retaliated against him because of his EEO activity related to the Boulder

Postmaster position. Plaintiff alleged that Christ and Smith threatened, demeaned, and harassed him.

By letter dated August 12, 2009, the Postal Service's EEO office informed Plaintiff that it had concluded processing his two informal complaints and that he could file a formal complaint.

B

In late November 2009, while at home, Plaintiff received a letter dated November 25, 2009, from Charmaine Ehrenshaft. Ehrenshaft has been the Postal Service's manager of labor relations for its Colorado/Wyoming district since August 2008. The letter instructed Plaintiff to appear for an investigative interview regarding allegations of non-compliance with the Postal Service's grievance procedures. As a Postmaster, Plaintiff had certain responsibilities with respect to handling employee grievances. Defendant alleges that Plaintiff was derelict in those duties. Specifically, from April 2009 through December 2009, Plaintiff and his post office chronically failed to comply with grievance procedures, which led to multiple adverse decisions against Postal Service management and to the Postal Service paying penalties and payouts to grievants. Ehrenshaft and David Knight, the manager of human resources for the Postal Service's Colorado/Wyoming district since June 2008, were also concerned that Plaintiff had intentionally delayed signing return receipts for grievances sent to him by the National Letter Carrier's Union ("NCLU"). On October 15, 2009, Knight was forwarded a congressional inquiry by Senator Mark Udall dated September 28, 2009, related to complaints

by the NCLU about Plaintiff to that effect. Defendant alleges that the purpose of the investigation and interview was to discuss these concerns.

On December 11, 2009, Ehrenshaft and Knight conducted the investigative interview. Plaintiff was represented at the interview by Robert Podio, a representative from the National Association of Postmasters. Knight asked Plaintiff about the grievance issues and intentionally delaying signing return receipts for grievances. He also asked Plaintiff about certain allegations that another Postal Service employee had levied against Plaintiff.

As Plaintiff's meeting with Knight and Ehrenshaft concluded, two agents from the Postal Service's Office of Inspector General ("OIG") entered the room. OIG is an independent branch of the Postal Service. OIG had initiated its own investigation into whether Plaintiff had intentionally delayed the mail. Knight had previously told an OIG agent that Knight would be interviewing Plaintiff on December 11, 2009, and that the agent could interview Plaintiff afterwards. Plaintiff's current attorney joined him for the OIG interview.

After the OIG interview, Knight and Ehrenshaft appeared. They gave Plaintiff an emergency placement letter to sign, which he did, thereby putting him on emergency placement effective immediately. The letter stated that Plaintiff was being placed in "off-duty status immediately" for the disruption of day-to-day postal operations. Knight ordered Plaintiff to surrender his Postal Service identification and cell phone and not to return to the Englewood post office.

Following the investigative interview and emergency placement, on December 12, 2009, Podio initiated negotiations with Knight to resolve the issues raised during the investigative interview. Through emails and phone calls, Podio, on Plaintiff's behalf, and Knight negotiated and reached a settlement agreement in which the Postal Service agreed not to pursue any of the issues discussed at the investigative interview if Plaintiff agreed to retire. On December 15, 2009, Knight sent Podio a draft settlement agreement, and Podio requested that certain changes be made. Ehrenshaft sent Podio a revised draft that same day.

On December 16, 2009, Plaintiff, Podio, and Knight signed a settlement agreement. By signing it, Plaintiff agreed to retire from the Postal service by March 31, 2010. Plaintiff submitted his retirement papers on February 9, 2010, and his retirement was effective March 31, 2010.

On February 17, 2010, Plaintiff filed a formal EEO complaint alleging that by putting him on emergency placement on December 11, 2009, Knight, Ehrenshaft, and Smith had retaliated against him for his prior EEO activity. On March 22, 2010, Plaintiff filed an informal EEO complaint in which he alleged that he had been constructively discharged by being forced to retire in retaliation for prior EEO activity. Plaintiff followed-up this informal complaint with a formal complaint on April 26, 2010, which made the same allegations.

C

Plaintiff then brought his dispute to this Court by filing suit on September 8, 2010. He asserted five

claims of retaliation under Title VII based on these five acts, respectively: (1) the investigative interview letter delivered to his home; (2) the investigative interview; (3) the threat of criminal prosecution for intentionally delaying the mail; (4) putting him on emergency placement; and (5) his constructive discharge by forced retirement.

On October 28, 2011, I dismissed Plaintiff's first three claims on the ground that Plaintiff had not exhausted his administrative remedies. *See* Doc #26. This left Plaintiff with his constructive discharge claim and his emergency placement claim, which were not at issue in that order. Defendant now moves for summary judgment as to those claims under Rule 56 of the Fed. R. Civ. P.

II. Standard of Review

Rule 56 provides that summary judgment "is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Concrete Works of Colo., Inc. v. City & Cnty of Denver*, 36 F.3d 1513, 1516 (10th Cir. 1994) (quoting Fed. R. Civ. P. 56(c)); *see also Klen v. City of Loveland, Co.*, 661 F.3d 498, 508 (10th Cir. 2011)). A fact is material if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is genuine if "there is sufficient evidence on each side so that a rational trier

of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248). When applying this standard, I must view the evidence and draw all reasonable inferences therefrom in the light most favorable to Plaintiff as the nonmoving party. *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005).

As the moving party, Defendant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Adler*, 144 F.3d at 670-71. To meet this burden, he need not disprove Plaintiff's claims; rather, he must "simply point[] out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Id.* If he meets this initial burden, the burden shifts to the nonmoving party, Plaintiff, to "set forth specific facts showing that there is an genuine issue for trial." *Anderson*, 477 U.S. at 256. Plaintiff may not rest upon his pleadings to do so. *Id.* He must instead "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671 (internal quotations omitted). "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

III. Discussion

Title VII proscribes retaliating against an employee because he "opposed" any practice made unlawful by Title VII, or because he "participated . . . in an investigation, proceeding, or hearing under this

subchapter." *See* 42 U.S.C. § 2000e-3(a); *see also Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004).

A

Defendant argues that for a host of independent reasons, Plaintiff's constructive discharge claim cannot withstand summary. The first is that Plaintiff did not properly exhaust it. I agree.

1

A plaintiff must properly exhaust his administrative remedies before bringing suit under Title VII. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1409 (10th Cir. 1997); *Khader v. Apsin*, 1 F.3d 968, 971 (10th Cir. 1993). This rule applies to "'each discrete incident' of alleged discrimination or retaliation" because each incident "constitutes its own 'unlawful employment practice' for which administrative remedies must be exhausted." *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) ("[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.")). The requirement "serves to put an employer on notice of a violation prior to the commencement of judicial proceedings. This in turn serves to facilitate internal resolution of the issue rather than promoting costly and time-consuming litigation." *Id.* at 1211.

One component of properly exhausting a Title VII claim is that the plaintiff must have first consulted with an EEO counselor "prior to timely filing a complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a)(1). Contact must have been initiated with the EEO counselor "within 45 days of the date of the matter alleged to be discriminatory." *Id.* "This and other deadlines have been construed as a statute of limitations and are thus[] subject to waiver, estoppel, and equitable tolling." *Baltazar v. Shineski*, 2011 WL 2607154, *4 (D. Colo. July 1, 2011) (citing *Beene v. Delaney*, 70 Fed. App'x 486, 490-91 (10th Cir. June 27, 2003); *Hanlen v. Henderson*, 215 F.3d 1336, 2000 WL 628205, *3 (10th Cir. May 16, 2000) (addressing the 45-day deadline)). Under *Martinez* and *Morgan*, then, "contact with an EEO counselor is required within 45 days of each discrete discriminatory action" because "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice." *Id.* (quoting *Martinez*, 347 F.3d at 1210 (citing *Morgan*, 536 U.S. at 114)).

Determining when the 45-day period began means marking the date the claim accrued. In employment discrimination cases, "a claim accrues when the disputed employment practice – the demotion, transfer, firing, refusal to hire, or the like – is first announced to the plaintiff." *Almond v. Unified School Dist.*, 665 F.3d 1174, 1176 (10th Cir. 2011) (citing *Del. State. Coll. v. Ricks*, 449 U.S. 250 (1980)). The Tenth Circuit has explained that this is so even when the consequences of an alleged discriminatory action are felt by the employee at a later date: "[W]hether the

adverse consequences flowing from the challenged employment action hit the employee straight away or only much later, the 'limitations period [ ] normally commence[s] when the employer's decision is made' and 'communicated' to the employee." *Id.* (quoting *Ricks*, 449 U.S. at 258). Or, "[p]ut differently, the 'proper focus' is on the time that the employee ha[d] notice of 'the discriminatory acts,' not 'the time at which the consequences of the acts became most painful.'" *Id.* And although the Tenth Circuit has not addressed the specific issue of when a constructive discharge claim accrues, it has held that constructive discharge claims "should not be treated differently from any other adverse employment decision." *Hulsey v. Kmart Inc.*, 43 F.3d 555, 558 (10th Cir. 1994).

2

The inquiry thus turns to determining when Defendant's allegedly retaliatory actions that form the basis of this claim were communicated to Plaintiff or when he had notice of them. There is no dispute that all of the acts occurred on or before December 16, 2009. *See* Pl.'s Am. Compl. Doc #20 at 107-20; *see also* Def.'s Mot. Ex. F at 5-7 (Plaintiff's response to interrogatory asking him to list the "Specific Acts of Retaliation alleged in the action;" all actions occurred before December 16, 2009). There also does not appear to be a dispute that the acts were announced to, communicated to, or otherwise known by Plaintiff on the day they occurred or, at the latest, by December 16, 2009. *See* Pl.'s Am. Compl. Doc #20 at 107-20; Def.'s Mot. Ex. 34 at 5-7. The allegedly retaliatory acts that Plaintiff claims forced him to retire culminated with the settlement agreement, specifically the terms

therein, to which Plaintiff agreed by signing on December 16, 2009. Under *Ricks* and *Almond*, then, this claim accrued, at the latest, on December 16, 2009. *See Almond*, 665 F.3d at 1176; *Ricks*, 449 U.S. at 259 (limitations period began running when employee was informed of the denial of tenure, not from the date last employed). It is further undisputed that Plaintiff first made contact with the EEO regarding this claim on March 22, 2010. This was well over 45 days later. Plaintiff therefore failed to meet the timely contact requirement.

In opposition, Plaintiff does not argue waiver, estoppel, or equitable tolling of the 45-day clock. Nor does he contend that he in fact did not have notice of the acts underlying this claim until sometime within the 45 days before his March 22, 2010, contact. Plaintiff instead asks me to hold that for the purposes of exhaustion, the accrual date for a constructive discharge claim is the date an employee resigned. He submits that under that rule, here, the accrual date would be February 9, 2010 (when Plaintiff identified and informed Defendant of his retirement date), or March 31, 2010 (his retirement date). In support, he cites three cases and appears to assert that in constructive discharge cases the Tenth Circuit uses the date of an employee's resignation as the accrual date. Plaintiff's reliance on the cases is misplaced.

He first cites *Sioux v. Target Corporation*, 2010 WL 2927373, *3-4 (W.D. Okla. July 22, 2010) (unpublished). The court there indeed held that an employee's constructive discharge claim accrued when she gave her employer definitive notice of her intent to retire. *Sioux*, however, does not compel the conclusion

that Plaintiff here timely contacted the EEO. The case is not binding. It is also is distinguishable. There the plaintiff submitted a form on December 11, 2003, notifying the defendant that she was resigning and that her last day would be December 19, 2003. *Id.* at *1. Here Plaintiff signed an agreement to retire by a certain date, the terms of which Plaintiff claims forced him to retire – that is, constructively discharged him. He knew of these terms (and agreed to them) on December 16, 2009. Nevertheless, were I to apply *Sioux*'s reasoning, I would still conclude that Plaintiff's constructive discharge claim accrued on December 16, 2010. This is because in *Sioux* the court concluded that the employee's constructive discharge claim accrued on the date she notified her employer of her resignation and not on her last day of work. *Id.* at *3-4. Plaintiff notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day. Moreover, *Sioux* predates and appears contrary to *Almond*. *See* 665 F.3d at 1176.

Plaintiff also cites *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972 (10th Cir. 2008), and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998). *Fischer* did not address the accrual date of a constructive discharge claim. *See* 525 F.2d 972. *Draper* is not only non-binding, it appears contrary to *Almond*. Plaintiff offers nothing more than these three cases. He also addresses neither *Almond* nor *Ricks* despite the fact he asks me to repudiate them. I decline to do so.

Accordingly, I conclude that Plaintiff did not timely contact an EEO counselor regarding this claim; he therefore failed to properly exhaust it. Consequently, the claim cannot withstand summary

judgment. *See Baltazar*, 2011 WL 2607154, at *4; *DeWalt v. Meredith Corp.*, 288 Fed. App'x 484 (10th Cir. July 31, 2008) (unpublished); *see Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007). As a result, I need not reach Defendant's remaining arguments for summary judgment of this claim. *See Griffin v. Davies*, 929 F.2d 550, 554 (10th Cir. 1991) ("We will not undertake to decide issues that do not affect the outcome of a dispute.").

B

Defendant similarly argues that for multiple reasons he is entitled to summary judgment as to Plaintiff's emergency placement claim, the first being that Plaintiff cannot establish the second element of a prima facie case of retaliation. Again I agree.

1

The *McDonnell Douglas* burden-shifting analysis applies to Plaintiff's claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Stover*, 382 F.3d at 1070. Under this scheme, Plaintiff has the initial burden of establishing a prima facie case of retaliation. *Stover*, 382 F.3d at 1070. Doing so shifts the burden to Defendant to produce a legitimate, nondiscriminatory justification for taking the disputed employment action. *Id.* at 1071. If Defendant so provides the burden oscillates back to Plaintiff to show that the proffered reason is a pretext for unlawful discrimination. *Id.* He may demonstrate pretext "by showing the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief." *Id.*

To establish a prima facie claim of retaliation, Plaintiff must show "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008). The second element requires Plaintiff to establish "that a reasonable employee would have found the challenged action materially adverse – that is, that the action might 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination. . . .'" *Id.* at 1213 (quoting *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 803 (10th Cir. 2007) (quoting *Burlington Northern and Sante Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006))). Requiring the action to be materially adverse is designed "to separate trivial harms from actionable injuries because Title VII does not establish 'a general civility code for the American workplace.'" *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). The term does not include "a 'mere inconvenience or an alteration of job responsibilities.'" *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1136 (10th Cir. 2005) (quoting *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir. 2000)). The allegedly retaliatory conduct "must produce an injury or harm." *Somoza*, 513 F.3d at 1212 (citing *Burlington Northern*, 548 U.S. at 67).

It is important to underscore that the "test for determining whether an action would have been considered material by an employee is an objective test, asking how a reasonable employee would have

interpreted or responded to the action." *Id.* at 1213. The Supreme Court adopted a reasonable employee standard "because '[a]n objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.'" *Id.* (quoting *Burlington Northern*, 548 U.S. at 68-69).

2

I now apply these principles to the emergency placement. It is worth stating at the outset that this claim is based upon only the emergency placement, not any other allegedly retaliatory act. As a corollary, while mindful of the context in which it occurred, see *Somoza*, 513 F.3d at 1213, I hone my inquiry to whether the emergency placement might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Firstly, Plaintiff fails to sufficiently identify, much less establish, how the emergency placement harmed or injured him. Beginning with economic harm, Defendant submits evidence demonstrating that Plaintiff received his regular pay without interruption from the date of his emergency placement through his retirement on March 31, 2010. *See* Def.'s Mot. Ex. A (Ehrenhshaft Affidavit) 45, 46 (first paragraph numbered 46), and Attach. 17 (Plaintiff's pay records). Plaintiff does not argue otherwise; nor does he offer any evidence to that effect. *See Kirch v. Embarq Mgmt. Co.*, ___ F.3d ___, 2012 WL 6720670, *5 (10th Cir. 2012) ("In a summary judgment proceeding a party's assertion of undisputed facts is ordinarily credited by the court unless properly disputed by the

opposing party.") (emphasis added); *see* Fed. R. Civ. P. 56(e) ("If a party . . . fails to properly address another party's assertion of fact . . . , the court may . . (2) consider the fact undisputed for purposes of the motion. . . ."). The placement letter also states that Plaintiff would "remain on the rolls." Def.'s Mot. Ex. C Attach. 14.

To be sure, Plaintiff argues that he was nominally placed in off-duty status without pay and asserts that this "affects" an employee's employment status. This is unavailing. It does not raise a genuine issue of material fact as to whether he was actually paid. Defendant explains that while non-pay status is the default status for emergency placement the Postal Service may still decide to keep paying the employee, and it presents undisputed evidence that occurred here. *See id.* In fact, the emergency placement letter does not state that Plaintiff was placed in "non-pay status;" it states that Plaintiff was placed in "off-duty status" and that "the employee is returned to duty status when the cause for nonpay status ceases." Def.'s Mot. Ex. C Attach. 14 (emphasis added). Furthermore, the assertion that emergency placement in off-duty status without pay affects an employee's employment status is unsupported and conclusory. It is also insufficient to show a materially adverse action: to be materially adverse, an action must do more than just "affect" an employee.

I note that because Plaintiff remained employed while on emergency placement and continued receiving pay at his current salary until his retirement, his emergency placement was more akin to administrative leave with pay. Being placed on

administrative leave with pay, even to be investigated, does not constitute an adverse employment action. *See Joseph v. Leavitt*, 465 F.3d 87, 90 (2nd Cir. 2006); *Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 889, 892 (8th Cir. 2005); *Peltier v. United States*, 388 F.3d 984, 986, 988 (6th Cir. 2004); *Breaux v. City of Garland*, 205 F.3d 150, 154-55, 158 (5th Cir. 2000). Plaintiff does not argue with this analogy or rule.

Plaintiff also does not argue or establish that the emergency placement resulted in some other economic harm or injury, such as a loss of benefits. He likewise fails to argue or show that the placement wrought any non-economic harm. He thus fails to establish that the placement caused any injury or loss. *See Somoza*, 513 F.3d at 1212 (the allegedly retaliatory conduct "must produce an injury or harm"); *see also Morrison v. Carpenter Tech. Corp.*, 193 Fed App'x 148, 154 (10th Cir. Aug. 22, 2006) (concluding that the plaintiff had failed to establish second prong of his retaliation claim in part because the action did not result in any economic harm to the plaintiff).

Secondly, there is no evidence that the emergency placement rose to the level of discipline necessary to be materially adverse. "Disciplinary proceedings, such as warning letters and reprimands, can constitute an adverse employment action." *Medina*, 413 F.3d at 1137. "A reprimand, however, will only constitute an adverse employment action if it adversely affects the terms and conditions of the plaintiff's employment – for example, if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities." *Id.* Plaintiff does not

establish that any of these occurred as a result of the emergency placement; nor does he submit evidence to that effect.

Defendant also submits evidence that emergency placement in off-duty status is not even considered a disciplinary action, that it does not affect the employee's employment status, and that Plaintiff's emergency placement letter was never placed in Plaintiff's personnel file. *See id.* (concluding that an employer's warning letter to an employee fell short of materially adverse in part because the letter was not placed in the employee's personnel file and because the plaintiff did not demonstrate that her subsequent employer – or any subsequent employer – had discovered or could discover the letter in the future). The emergency placement letter itself suggests that the placement was not discipline. It states that Plaintiff would "remain on the rolls" and that "[u]se of these emergency procedures *does not preclude disciplinary actions* based upon the same conduct." Def.'s Mot. Ex. C Attach. 14 (emphasis added). Plaintiff responds to this only by denying these facts and asserting that emergency placement in an off-duty status without pay "affects" the employees status, and he does not provide contrary evidence. *See* Pl.'s Resp. at 15 86. This is not enough. *See Elephant Butte Irr. Dist. ov New Mexico v. U.S. Dep't of Interior*, 538 F.3d 1299, 1305 (10th Cir. 2008) ("Under Fed. R. Civ. P. 56, a party opposing a motion for summary judgment 'may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should,

if appropriate, be entered against that party.'") (quoting Fed. R. Civ. P. 56(e)(2)). He also ignores that the evidence establishes that he was in fact paid during the emergency placement.

Thirdly, it is undisputed the emergency placement *did not* preclude or otherwise dissuade Plaintiff from pursuing and engaging in protected activities during and after the placement. He went on to contact an EEO counselor and file a complaint concerning the emergency placement. "Thus, the alleged retaliation attempt [was] apparently [] unsuccessful." *Somoza*, 513 F.3d at 1214. While by no means dispositive, "the fact that an employee continues to be undeterred in his or her pursuit of a remedy, as was the case here, may shed light as to whether the actions are sufficiently material and adverse to be actionable." *Id.* (in case were the plaintiffs were not dissuaded by the defendant's alleged material and adverse retaliatory conduct, the court concluded that plaintiffs failed to show a materially adverse action).

Finally, Plaintiff's failure to argue and establish that the emergency placement was materially adverse goes beyond those specific ways discussed. In response to Defendant's motion, Plaintiff neither proffers nor directs the court to evidence that raises a genuine dispute of material fact as to whether the emergency placement was materially adverse. *See Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283-84 (10th Cir. 2010) (opponent's response to summary-judgment motion must raise a factual dispute that is material to the motion). He instead offers mere conclusory and unsupported denials and quibbles with facts immaterial to that issue. *Compare* Def.'s Mot. at 16-18

84-98, *with* Pl.'s Resp. at 15-17 84-98; *see also Elephant Butte*, 538 F.3d at 1305. Furthermore, in its entirety, Plaintiff's argument in support of the second prong of the prima facie case is the following:

> *Adverse Action*
>
> Both the Agency's investigation and Green's emergency placement without pay were adverse actions. *Kulikowski v. Board of County Com's of City of Boulder*, 231 F. Supp. 2d, 153 (D. Colo. 2002) (a sham investigation is adverse action under Title IIV). Moreover a suspension without pay constitutes an adverse action. *See, Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998).

Pl.'s Resp. at 36-37. This patently falls short-particularly in light of the undisputed evidence that Plaintiff was paid his full salary without interruption after the emergency placement.

It is worth reiterating that Plaintiff bears the burden of showing that a reasonable person would have found the emergency placement materially adverse. *Stover*, 382 F.3d at 1070; *Somoza*, 513 F.3d at 1212. Whether any one of the four considerations I have discussed would alone preclude the emergency placement from being materially adverse is a question I need not answer. When these considerations are aggregated, even when the facts and reasonable inferences therefrom are viewed in a light most favorable to Plaintiff, I conclude that Plaintiff fails to demonstrate that his emergency placement was a materially adverse action. Consequently, he has failed to discharge his burden of showing a prima facie case

of retaliation. The claim therefore cannot withstand summary judgment. As a result, I need not reach Defendant's other arguments. *Griffin*, 929 F.2d at 554.

C

I feel compelled to address an additional matter raised in the last two pages of Plaintiff's response. As explained, Plaintiff originally brought a claim alleging that Knight had retaliated against him by threatening criminal prosecution. *See* Doc #26 at 1. Pursuant to Defendant's motion to dismiss pursuant to Fed R. Civ. P. 12(b)(1), I dismissed this claim on the ground that Plaintiff had not exhausted it. *See id.* Now, in the final two pages of his response, Plaintiff "moves" that I reinstate it. Pl.'s Resp. at 43-44. The Local Rules of the District of Colorado provide that "[a] motion shall not be included in a response or reply to the original motion. A motion shall be made in a separate paper." D.C. COLO. LCivR 7.1.C. I thus deny Plaintiff's request. *See, e.g.*, *Shepherd v. Liberty Acquisitions*, LLC, 2012 WL 2673101, *1 n.1 (D. Colo. 2012); *Precision Fitness Equip., Inc. v. Nautilus, Inc.*, 2009 WL 3698525, *4 (D. Colo. Nov. 4, 2009) (unpublished).

D

A final issue should be addressed. The parties understandably spend much time on other aspects of Plaintiff's claims, including whether Plaintiff establishes a prima facie case of retaliation for his constructive discharge claim and whether he can show the third prong of the prima face case for his emergency placement claim. Indeed, pursuant to my January 24, 2013, order [Doc #128], at trial, a jury would be instructed that there is evidence of pretext. But, as the parties recognize, analytically, these issues are all continent upon and follow those that I have decided. To rule on this motion, I need not assess

whether the parties have met their respective burdens under the *McDonnell Douglas* framework as to Plaintiff's constructive discharge claim if, as I have determined, Plaintiff did not exhaust the claim. Nor must I consider whether Plaintiff has shown the third element of the prima facie case for his emergency placement claim or has shown pretext it, as happened here, Plaintiff failed to establish the second element. Two consequences flow from this: First, I decline to consider these issues because "[I] will not undertake to decide issues that do not affect the outcome of a dispute." *Griffin*, 929 F.2d at 554. Second and more importantly, these facts, and any dispute over them, do not preclude summary judgment. *Concrete Works*, 36 F.3d at 1516 ("Summary judgment is appropriate only if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") (citing Fed. R. Civ. P. 56(c)) (emphasis added); *Adler*, 144 F.3d at 670 ("An issue fact is 'material' if under the applicable substance law it is essential to the proper disposition of the claim.") (emphasis added).

IV Conclusion

For the reasons set forth above, IT IS ORDERED that Defendant's Motion for Summary Judgment [Doc #90] is GRANTED, this action is DISMSSED, and Defendant is awarded costs.

Date: February 4, 2013 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock

LEWIS T. BABCOCK, JUDGE